

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JEFFREY D. ROBERTS**

Claimant

VS.

**SEDGWICK COUNTY**

Respondent

Self-Insured

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Docket No. 1,009,779

**ORDER**

Respondent appeals the June 2, 2005 Award of Administrative Law Judge John D. Clark. Claimant was found to be permanently and totally disabled from an injury occurring on March 3, 2003. The Appeals Board (Board) heard oral argument on September 20, 2005, in Wichita, Kansas.

**APPEARANCES**

Claimant appeared by his attorney, Phillip B. Slape of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Robert G. Martin of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

**ISSUE**

What is the nature and extent of claimant's injury and/or disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

The ALJ set out findings of fact and conclusions of law in some detail in the Award and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant suffered an injury to his cervical spine when, on March 3, 2003, while sitting in an office chair, the pedestal on the chair sheared off and claimant fell backwards onto the floor, striking his back and his head. The record indicates claimant may have lost consciousness for a period of time. Claimant was taken to the St. Francis Hospital emergency room, where he was released the same day. He went to Minor Emergency Center on March 10, 2003, due to increased pain, where he was examined by Larry Wilkinson, M.D. On March 11, 2003, an MRI of the cervical spine was performed, which revealed a large disc protrusion at the C6-7 level, with a protrusion at C7-T1 to the left of midline.

Claimant was then referred to board certified neurosurgeon Paul S. Stein, M.D., for an examination on March 13, 2003. Claimant was diagnosed with closed head injury and posttraumatic and cervico-genic headaches; cervical, thoracic and lumbar strain; and a herniated disc at C6-7. Physical therapy was prescribed daily for one week and then three times per week for three weeks, with modalities of massage and gentle stretching. Claimant also underwent an epidural steroid injection at C5-6. On May 9, 2003, Dr. Stein determined that a discectomy and fusion at C6-7 might be beneficial to claimant. At that time, claimant was referred to John P. Gorecki, M.D., a board certified neurosurgeon. On July 24, 2003, claimant underwent a two-level anterior cervical discectomy and fusion. After the surgery, claimant suffered from what was described as a hoarse voice, which was later determined to have resulted from vocal cord paralysis on one side. Claimant sustained this vocal cord paralysis at the time of surgery for the cervical discectomy and fusion. From the record, this condition appears to be permanent.

Dr. Gorecki determined claimant had an 18 percent impairment to the body as a whole based upon the fourth edition of the AMA *Guides*<sup>1</sup> for the injuries to his cervical spine. Dr. Gorecki noted that the paralysis to claimant's vocal cords was not a condition over which he maintained any expertise and deferred to an ENT (ear, nose and throat) specialist for any vocal-related questions and/or impairments. When Dr. Gorecki last examined claimant, claimant was taking Darvocet and Tramadol. Dr. Gorecki agreed that Darvocet, which is a mild narcotic analgesic, can affect claimant's ability to concentrate. He also agreed that the Tramadol causes sedation and several other side effects, which might also affect claimant's ability to concentrate. Dr. Gorecki opined that claimant could return to the light category of work as defined by OSHA unless Eric Bunting, M.D., recommended otherwise.

Dr. Stein last examined claimant on May 12, 2004, approximately a year after claimant's discectomy and fusion. He diagnosed anterior discectomy and fusion at C6-7 and C7-T1, with claimant suffering a very hoarse voice, which made it difficult for him to speak loudly. He found claimant's head to chronically tilt to the left, which Dr. Stein believed was related to muscle spasm, and discovered very little range of motion in

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

claimant's neck. He determined that claimant was limited in both active range of motion and passive range of motion, with the left triceps reflex being absent. Pursuant to the fourth edition of the *AMA Guides*,<sup>2</sup> he determined that claimant had a DRE Category IV, resulting in a 25 percent whole person impairment. This rating was also exclusive of any impairment for claimant's vocal cords, with Dr. Stein also determining that that was outside of his area of expertise. He also felt this would be a question for an ENT specialist.

Dr. Stein also determined that, in his opinion, claimant was realistically and essentially unemployable due to a lack of range of motion in his neck and an inability to use his voice. He felt it would be difficult for claimant to communicate to any significant degree, which would limit his ability to deal with people. He also felt claimant's range of motion limitations in the neck added to claimant's significant disability. He testified that it would be difficult for claimant to hold his head up (which he opined would weigh in the range of 9 to 10 pounds) during an 8-hour work day. When added to claimant's voice limitations, he doubted that claimant would be employable. He did agree that if it was just the voice alone, claimant would be employable, but with the combination of limitations, he did not consider claimant employable. He testified that sedentary work would be the only thing claimant would potentially be able to do, assuming he could manage the pain. He placed no specific restrictions on claimant because he testified it would be a very long list and, in his opinion, he did not believe that claimant was realistically and essentially employable and, therefore, specific restrictions would not be necessary.

Claimant was examined by Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation. This examination, on September 20, 2004, was at the request of claimant's attorney. Dr. Murati diagnosed claimant with neck pain status post anterior cervical discectomy and fusion, C6-7 and C7-T1; and vocal cord paralysis. Pursuant to the *AMA Guides*, Dr. Murati found claimant to be impaired at the DRE Category IV level, for a 25 percent impairment for the discectomy and fusion in the cervical spine. For the paralysis of the vocal cords, he found claimant had a Class II speech impairment of 34 percent, which converts to a 12 percent whole person impairment. When combining the two, he found claimant to have suffered a 34 percent whole person impairment pursuant to the fourth edition of the *AMA Guides*.<sup>3</sup> Dr. Murati also determined that claimant is essentially and realistically unemployable based upon a combination of the cervical limitations and the voice limitations. He testified claimant was going to have good and bad days, and that he would need medication for the bad days and would have difficulty concentrating due to the amount of narcotic medication he would have to take. He also testified that claimant would have significant difficulties with any job that required verbal communication. He agreed that claimant could essentially work under the limitations, but he would have difficulties because he would miss numerous days, which he described as

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<sup>2</sup> *AMA Guides* (4th ed.).

<sup>3</sup> *AMA Guides* (4th ed.).

being the “bad days,” which would, in all likelihood, result in claimant’s being terminated from work for attendance problems. Essentially, Dr. Murati felt, with all of his limitations, claimant would be unemployable.

Claimant was seen and evaluated by three vocational experts in this case. Jerry D. Hardin, Karen Crist Terrill and Dan R. Zumalt all examined claimant at various times upon referrals from either claimant or respondent attorneys. Both Mr. Hardin and Ms. Terrill opined that claimant is realistically and essentially unemployable as a result of his injuries, with Mr. Zumalt opining that claimant should be able to return to accommodated work.

Mr. Zumalt testified claimant would be able to work as a medical records technician, opining that claimant would not have difficulties communicating and performing that job. Mr. Zumalt, however, acknowledged that his interview took him two meetings with claimant involving two hours at each meeting, which is longer than it would take with the usual claimant, because of communication problems he encountered with claimant.

In workers compensation litigation, it is the claimant’s burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>4</sup> The ALJ determined claimant was permanently and totally disabled, finding that claimant, in this instance, could not even be a greeter for Wal-Mart. The Board agrees. Claimant’s limitations to his cervical spine, which restrict his mobility and ability to function physically, when coupled with his vocal limitations and added to the narcotic medications claimant is required to take in order to control the pain, put claimant in a position of being unable, in the Board’s opinion, to engage in any type of substantial gainful employment. In essence, claimant is realistically and essentially unemployable from these injuries and resulting conditions after the surgery.<sup>5</sup> The Board, therefore, finds that the determination by the ALJ that claimant is permanently and totally disabled should be affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated June 2, 2005, should be, and is hereby, affirmed.

Claimant is entitled to 65.43 weeks of temporary total disability compensation at the rate of \$388.25 per week totaling \$25,403.20. Thereinafter, claimant is entitled to

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<sup>4</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

<sup>5</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

permanent partial disability compensation payments at the rate of \$388.25 per week, for a total award not to exceed \$125,000 for a permanent total disability.

As of September 22, 2005, there would be due and owing to claimant 65.43 weeks of temporary total disability compensation at the rate of \$388.25 per week totaling \$25,403.20, followed by 68 weeks of permanent partial disability compensation at the rate of \$388.25 per week totaling \$26,401.00, for a total due and owing of \$51,804.20, which is ordered paid in one lump sum minus any amounts previously paid. The remaining balance of \$73,195.80 is to be paid at the rate of \$388.25 per week, until fully paid or further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant  
Robert G. Martin, Attorney for Respondent  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director